NOTES

MEETING COMPETITION UNDER THE ROBINSON-PATMAN ACT: EFFECTIVE ENFORCEMENT THROUGH FLEXIBLE INTERPRETATION

While chain stores came to the New World in 1670 with the almost legendary Hudson Bay Company,[1] it was the equally marvelous Great Atlantic and Pacific Tea Company which pioneered a dramatic shift in consumer purchasing patterns after World War I. As chain stores startlingly increased their sales from four percent of all retail business at the war's end to 22.8 percent in 1935,[2] the courts ruled that existing legislation did not prohibit these buying-power giants from soliciting and accepting discriminations in price from suppliers seeking their business. Existing law permitted *any* difference in price where based on *any* difference in quantity.[3] To meet this situation the original draft of the Robinson-Patman Bill prohibited discriminatory pricing absolutely.[4] No provision was made for the meeting of competition—a purposeful omission in a law born basically of a desire to control large retailers[5] and thus to protect small distributors.[6] However, at the congressional conference the bill was revised to legalize price discrimination where "made in good faith to meet an equally low price of a competitor."[7] This proviso did not restore the prior law's broad permission of price discrimination, but it offers an opportunity to harmonize the prohibitions of the Robinson-Patman Act with the encouragement of competition basic to the other antitrust laws.

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[1] NICHOLS, CHAIN STORE MANUAL 8 (1932).

[2] BECKMAN & NOLAN, THE CHAIN STORE PROBLEM 24-25 (1938).

[3] 38 Stat. 730 (1914): "Nothing herein contained shall prevent discrimination in price . . . on account of differences in the grade, quality or quantity of the commodity sold." See Goodyear Tire & Rubber Co. v. FTC, 101 F.2d 620 (6th Cir. 1939); H.R. REP. No. 2287, 74th Cong., 2d Sess. 7, 16 (1936).

[4] S. 3154, H.R. 8442, 74th Cong., 1st Sess. (1935).

[5] See Max Factor & Co., TRADE REG. REP. ¶ 16992, at 22066 (FTC July 22, 1964) (to control "buying power").

[6] The catalyst of reform was the FTC, CHAIN STORE REPORT (1934) with its revelations of large retailers' ability to obtain discriminatorily favorable prices. Elimination of this power was believed necessary to save small distributors. See *Hearings Before House Special Committee To Investigate American Retail Federation*, 74th Cong., 1st Sess. *passim* (1935); H.R. REP. No. 2287, 74th Cong., 2d Sess. (1936); S. REP. No. 1502, 74th Cong., 2d Sess. (1936).

[7] (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, how-*

I. Competition and the Robinson-Patman Act

A. Significance of the Meeting Competition Defense

If the meeting competition defense is given viable interpretation, the Robinson-Patman Act becomes consonant with the other antitrust laws. Like both the Sherman and Clayton Acts, the Robinson-Patman Act would proscribe only price discriminations based upon economic power unrelated to true economic advantages.[8] At least under the words of the statute, price discrimination where cost justified, competition justified, or demanded by changed market conditions is legal. However, the Federal Trade Commission has unnecessarily encumbered the Robinson-Patman Act with an anticompetitive construction. From its enactment the Commission has been hostile to the meeting competition defense to price discrimination.[9] A direct holding of the United States Supreme Court was required to force the Commission to recognize the defense as an absolute and not a conditional barrier to Robinson-Patman Act convictions.[10] The Commission nonetheless kept untarnished until 1963 its record of never having voluntarily sustained the defense.[11] Only after several reversals in the courts

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ever, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Robinson-Patman Act §2(b), 49 Stat. 1526 (1936), 15 U.S.C. §13 (1958); see H.R. Rep. No. 2951, 74th Cong., 2d Sess. (1936).

[8] Anti-chain store motivation must not be confused with the congressional intent expressed in the legislation as enacted. Meeting competition was in fact allowed. The Supreme Court has spoken of the difficulty of reconciling the Robinson-Patman Act's "economic theory" with that of the Sherman and Clayton Acts. See Automatic Canteen Co. v. FTC, 346 U.S. 61, 63, 73-74 (1953); Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951); FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 405-06 (1953) (Frankfurter, J., dissenting). The act's "economic theory" is not that of its most vigorous sponsors who would have omitted the meeting competition justification entirely, but rather that of the Congress which included this proviso.

[9] Immediately after the passage of the act, the Commission seemed to accept the meeting competition clause; some of its early cease-and-desist orders recognized the availability of the defense to charges brought under §2(a). BNA, Antitrust & Trade Reg. Rep. No. 170, at B-1 (Oct. 13, 1964). However, none of the FTC's orders prior to *Standard Oil,* see note 10 *infra,* are necessarily inconsistent with the Commission's later contention that the meeting competition defense was available in answer to §2(a), but only as one factor to be evaluated with other considerations.

[10] Standard Oil Co. v. FTC, 340 U.S. 231 (1951). The Commission had ruled that an absolute defense was not provided by the statutory language of §2(b). 41 F.T.C. 263, 281-83 (1945), *modified on rehearing,* 43 F.T.C. 56 (1946). Before the Supreme Court the Commission argued that the statutory language permitted consideration of a meeting competition defense only as one factor among others in determining whether the price discrimination carried the requisite anticompetitive effect. The Commission did not literally urge that the defense should be unavailable whenever there might be an injury to competition at the resale level, as Mr. Justice Burton apparently feared. 340 U.S. at 250-51.

[11] While the theoretical availability of the meeting competition defense may possibly have influenced field investigators in deciding not to recommend further action in individual cases, not until December 1963 did the FTC finally accept, without judicial compulsion, a meeting competition defense as a complete exculpation. Continental Baking Co., Trade Reg. Rep. ¶16720 (FTC Dec. 31, 1963). In *Standard*

of appeals did the Commission finally agree to extend to promotional discriminations the Supreme Court's specific order to accept meeting competition defenses to price discrimination.[12] In this area reversal of the Commission by the courts is not surprising. The judiciary has been far more receptive than the Commission to the meeting competition clause,[13] and to a large extent the interpretations of the Sherman and Clayton Acts recognizing the realities of competition have been judicial constructions.[14]

An interpretation of the Robinson-Patman Act similarly favorable to competition depends upon liberal acceptance of the meeting competition clause. In contrast to the "reasonableness" qualification applied to alleged violations of the Sherman Act and even to the broad criterion of the Clayton Act—"substantially to lessen competition"—,[15] the Robinson-Patman Act applies indiscriminately to all price discriminations which "prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with the customers of either of them."[16]

Oil, supra note 10, the Commission on remand confirmed its prior result by deciding that Standard Oil, although now entitled by Supreme Court decision to assert a fully exculpatory § 2(b) defense, had not established it factually. 49 F.T.C. 923 (1953). The Seventh Circuit reversed, 233 F.2d 649 (1956), and the Supreme Court affirmed the court of appeals' findings on the record, 355 U.S. 396 (1958). For the FTC's continued refusal to allow the defense, see, *e.g., Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 85th Cong., 1st Sess. pt. 1, at 636 (1957).

[12] See Robinson-Patman Act § 2(d), 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1958). The FTC refused to apply the defense to promotional allowances in Henry Rosenfeld, Inc., 52 F.T.C. 1535 (1956) (alternative holding), although the trial examiner had ruled it applicable. Similar holdings, however, were reversed on appeal in Shulton, Inc. v. FTC, 305 F.2d 36 (7th Cir. 1962), and in Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1963). On remand the Commission did accept the applicability of the defense, but found in *Exquisite Form* that the respondent's price discrimination had not been made in good faith. TRADE REG. REP. ¶ 16753 (FTC Jan. 20, 1964). In *Shulton* the hearing examiner on remand upheld the § 2(b) defense and recommended dismissal of the complaint. BNA, ANTITRUST & TRADE REG. REP. No. 134, at A-9 (Feb. 4, 1964). But the Commission, *sub nom.* Max Factor & Co., TRADE REG. REP. ¶ 16992 (FTC July 22, 1964), ultimately dismissed the charges on other grounds without reaching the meeting competition defense. See notes 106-09 *infra* and accompanying text.

[13] See notes 107-13 *infra* and accompanying text.

[14] See United States v. United Shoe Mach. Co., 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954): "In the antitrust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law."

[15] United States v. Standard Oil Co., 221 U.S. 1, 59-60 (1911); *cf.* Nash v. United States, 229 U.S. 373 (1913).

[16] (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which commodities are to such purchasers sold or delivered: . . . *And provided further*, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting

This has engendered the widespread charge [17] that the act itself is in conflict with the other antitrust laws, for this Robinson-Patman standard protects both efficient and inefficient "competitors" without evaluating the overall effect on total competition of a particular differential. The only qualifications to this rigid rule are found in the affirmative defenses.

The "changing conditions" defense [18] is necessarily exceptional in its application and is irrelevant under normal circumstances. Moreover, the use of this defense too has been severely restricted by the FTC.[19] While in theory price discriminations based on cost justification are permissible,[20] the difficulty of establishing a pure cost justification is overwhelming. As the Supreme Court has said: "[C]ost justification being what it is, too often no one can ascertain whether a price is cost-justified." [21] On only a half-dozen occasions since the passage of the Robinson-Patman Act has a respondent been fully exculpated through cost justification.[22] The majority of such defenses, although argued in full complexity, have been rejected.[23]

Moreover, the significance of this defense is highly attenuated by the business necessity of functional pricing, in which costs are not decisive determinants of actual charges.[24] In a competitive system only by the most fortuitous circumstances will all enterprises sustain precisely identical costs and benefit identically from cost savings resulting from sales in quantity. Even as to prices set basically by cost, some allowance for meeting a competitive price realistically should be permitted.[25]

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the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Robinson-Patman Act § 2(a), 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).

17 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 181 (1955); Apsey, *Establishing Meeting Competition Defense to Charge of Price Discrimination Under the Robinson-Patman Act*, PRAC. LAW. 76-85 (Feb. 1957); Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, in ABA SECTION OF ANTITRUST LAW 60, 65 (1952).

18 Robinson-Patman Act § 2(a), 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958) (fourth proviso).

19 See, *e.g.*, Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356, 369 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956); Joseph A. Kaplan & Sons, TRADE REG. REP. ¶ 16666 (FTC Nov. 15, 1963); Sperry Rand Corp., TRADE REG. REP. ¶ 16350 (FTC March 18, 1963). *But cf.* Valley Plymouth v. Studebaker Packard Corp., 219 F. Supp. 608 (S.D. Cal. 1963).

20 Robinson-Patman Act § 2(a), 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958) (first proviso).

21 Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 79 (1953).

22 Rowe, *The Federal Trade Commission's Administration of the Anti-Price Discrimination Law*, 64 COLUM. L. REV. 415, 424 n.49 (1964).

23 As of 1961 only in five of fourteen fully argued cases had the FTC accepted the justification, and even in these five cases the Commission did not consistently permit the defense against all the differentials charged. Sawyer, *Cost Justification*, 9 ANTITRUST BULL. 285, 296-98 (1964).

24 See DAVISSON, MARKETING OF AUTOMOTIVE PARTS 953 (1958); SAWYER, BUSINESS ASPECTS OF PRICING UNDER THE ROBINSON-PATMAN ACT 6-7 (1963).

25 Adelman, *Price Discrimination as Treated in the Attorney General's Report*, 104 U. PA. L. REV. 222, 236 (1955): "[T]he real importance of section 2(b) is this: it permits cost savings to be passed on, not directly by being 'justified' under 2(a), but indirectly, through the need to meet the competition of the first sellers offering the lower prices."

Thus the meeting competition defense is basic to any reconciliation among the various antitrust laws and is doubly important because of the general unavailability of any other restraint on the unfortunate anticompetitive effects of an absolute prohibition against price differentials.

B. Inadequacies of the Robinson-Patman Act

Restrictive FTC interpretation of the meeting competition defense would place businessmen in a nightmarish quandry were it not for the misdirection of the inadequate remedial provisions of the act. Although the emergence of gigantic buying power led to the enactment of the Robinson-Patman Act, the provisions of the law are largely concerned with sellers. Section (f) does in fact make it unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited" by the act. However, the knowledge requirement in section (f) [26] makes conviction difficult—just as utilization of the meeting competition defense is hindered where the Commission demands actual knowledge of the price allegedly met.[27]

This focus on sellers is unrealistic. Sellers have no incentive, independent of competitive pressures, to offer discriminatorily lower prices to any customers. Lower prices result from the ubiquitous "business reason"—either a buyer's irresistible demand for preferential treatment, or a competitor's offer which must be matched. If the seller maintains his price, he may lose a customer; if he grants the differential, he might be investigated by the FTC. But the seller's pragmatic choice is one-sided. Historically the FTC has concentrated on inconsequential [28] complaints randomly selected from its correspondence.[29] Even if the seller should come to the Commission's notice,[30] he will be penalized, after consuming considerable Commission time and effort if he contests the charge, by a

[26] Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953).

[27] See notes 39-40 *infra* and accompanying text.

[28] Investigators found in 1949 that 70% of the cases leading to FTC cease-and-desist orders involved false and misleading advertisement, while the remaining 30% affected small corporations of little consequence to the economy. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON REGULATORY COMMISSIONS app. N, at 122 (1949). More recently the Commission has been reported to have a larger number of professional employees in the restraint-of-trade division than in the deceptive advertising branch. Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 392 (1964). But this fact is itself deceptive, for the greater complexity of restraint-of-trade cases no doubt requires a greater proportion of professional to clerical and investigatory work than in deceptive advertising.

[29] During the period 1958-1962, between one-third and two-thirds of all investigations arose directly from complaints, not from independent FTC action. See the estimates of Auerbach, *supra* note 28, at 393-94,—1958, 52%; 1959, 47%; 1960, 31%; 1961, 69.2%; 1962, 62.8%.

[30] There were only 354 complaints issued by the Commission under § 2(a) during the first 27 years of the act (through June 1963). Of these, 114 were dismissed or dropped and 54 were still pending—leaving 186 total orders entered under this section during the entire history of the act. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 168 (Supp. 1964).

cease-and-desist order effective after sixty days unless challenged in the court of appeals.[31] In effect the seller is informed that what he has already done is illegal,[32] and that he should not do it again.[33] The original transgression is left unpunished[34]—save for the rare treble-damage suit,[35] notorious for its ineffectiveness.[36]

In the meeting competition situation this inequality of temptation is magnified because even ethical influences push the businessman toward what may prove to be an "illegal" price. Since American business norms argue for the validity of meeting competition, the uninformed businessman may think good-faith meeting of competition unquestionably legal. His mistake will result from reliance upon the plain meaning of the law. Artificial requirements raised by the FTC may make meeting competition illegal if the seller is not able to establish his defense by complying with the Commission's substantive standards. At the same time, the ineffectiveness of the act's penalty restraints make it unlikely that the act will deter the most flagrant and unjustifiable price discrimination. A "spiral" effect then multiplies the impact of these differentials; for once a single seller reduces his prices to a single customer or group of customers, the

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[31] 73 Stat. 243 (1959), 15 U.S.C. § 21 (Supp. IV, 1963). This automatic effectiveness after 60 days dates back only to 1959. Previously the Commission was required actively to seek enforcement of an order.

[32] The injured competitor may receive little solace, especially if he has been driven out of business by the incursions. See Forster Mfg. Co., TRADE REG. REP. ¶ 16243 (FTC Jan. 3, 1963). The FTC's cease-and-desist order was vacated in Forster Mfg. Co. v. FTC, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 33 U.S.L. WEEK 3284 (U.S. March 1, 1965).

[33] On occasion the Commission has even based policy on the nonpunitive nature of the cease-and-desist order. Thus, in Sears Roebuck & Co., TRADE REG. REP. ¶ 16791 (FTC Feb. 17, 1964), it dismissed a § 2(a) complaint based upon Sperry Rand's offer of a recently discontinued typewriter model to Sears & Roebuck at a price lower than that which had been generally available to Sears' competitors. The proceedings were dismissed on the grounds that the effect of the single incident here involved was too insignificant to justify action: "The purpose of Commission cease and desist orders is not to punish law violators, but to prevent the recurrence of unlawful conduct." *Id.* at 21735.

[34] Naturally, this lack of punitive enforcement has generated criticism. See *Hearings Before the House Select Committee on Small Business*, 84th Cong., 1st Sess. 374 (1956); Austern, *Five Thousand Dollars a Day*, 51 KY. L.J. 481 (1963).

[35] Treble damage actions are authorized by 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958) and 69 Stat. 282 (1955), 15 U.S.C. § 15(a) (1958). From 1936 to 1961, 111 private Robinson-Patman cases were reported. Final judgment for the plaintiff has been reported in only six cases. Barber, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 GEO. WASH. L. REV. 181, 191-92 (1961). For the causes underlying the ineffectiveness of the private suits, see Tomlin, *Private Recovery Under the Robinson-Patman Act—An Analysis and a Suggestion*, 43 TEXAS L. REV. 168, 173-88 (1964).

[36] See Note, 32 ST. JOHN'S L. REV. 300 (1958); 41 MINN. L. REV. 830, 832 (1957). Even where the FTC has issued a cease-and-desist order, many district courts have refused to admit the order as evidence in a private treble-damage suit. See, *e.g.*, Farmington v. Forster Mfg. Co., TRADE REG. REP. (1963 Trade Cas.) ¶ 70953 (D. Maine Nov. 26, 1963). (The FTC's cease-and-desist order in the *Forster* case was vacated in Forster Mfg. Co. v. FTC, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 33 U.S.L. WEEK 3284 (U.S. March 1, 1965)). The courts of appeals are split on admissibility, but the issue is now pending before the Supreme Court in Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 332 F.2d 346 (3d Cir.), *cert. granted*, 379 U.S. 877 (1964) (No. 291).

response of other sellers is necessarily to offer the same differentials to these buyers.[37]

If the Robinson-Patman Act is to be more than theoretically consistent with the competitive values of American antitrust law, it should be enforced whenever possible to prevent buyers from receiving discriminatory prices, but not to penalize the sellers who act to meet competition. The buyer receives the benefit of the special price every time a seller offers it. Since sellers who are responding to the illegal price then are tempted to offer similarly illegal prices to their other customers in order to forestall further business attacks by the original price-cutting seller, sound policy should seek to break the "spiral" process as early as possible. To a large extent the present law, without amendment, would allow implementation of such a policy. With only a few recent exceptions, however, the FTC has pursued almost a reverse policy—ignoring buyers and nullifying the meeting competition defense, but leaving the spiral of discriminatory prices without effective restraint.

II. Meeting Competition in "Good Faith"

A price discrimination made to meet an equally low price of a competitor must be made "in good faith." This phrase—omnipresent in regulatory legislation—has been rigidly interpreted by the Commission and encumbered with objective standards. Under the Commission's analysis a price discrimination, to be made in good faith, must exactly "meet" but not "beat" a competitor's price; it must be made to "retain" and never to "acquire" customers; and it must respond to a "known" price. The Commission's concentration on such conceptualistic formulae contrasts sharply with the practical attitude of most courts of appeals.[38]

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[37] This analysis assumes, for the sake of simplicity, an identity of cost factors for the various competitors, or at least such similarity that no seller's across-the-board price to all customers can be above cost and still equal the discriminatory price offered by a competitor to the favored customer. Such a price thus available to all buyers would not violate the price-discrimination law.

[38] A striking example of the dichotomy is the recent reversal by the Seventh Circuit of the FTC decision in American Oil Co., 60 F.T.C. 1786 (1963), *rev'd*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964). The FTC had rejected Amoco's meeting competition defense to charges of having reduced prices to some but not all of its gasoline stations in a given area. Amoco had responded to a localized "gas war" by making reductions only to the stations faced by immediately proximate price-cutting, but not to those further removed but apparently somewhat affected by the conflict. The FTC found that the profered meeting competition defense did not meet another of its formulae, the "legality" test—that is, respondent had not satisfied its evidentiary burden of demonstrating the likely legality of the price it claimed to be meeting. See notes 74-76 *infra* and accompanying text. The Seventh Circuit, however, could not reach this legality issue due to the intervening *Sun Oil* decision of the Supreme Court, 371 U.S. 505 (1963), which held that the meeting competition defense was inapplicable to discounts by a gasoline distributor to retail stations involved in a price war, because in such a situation the distributor was meeting its buyer's competition and not its own. The situation in *American Oil* was identical in form, since Amoco's distributors were engaged in a price war initially triggered by an independent retailer's price reduction. Although Amoco, in effect, was seeking to meet its customer's competition, it was not to be denied judicial protection. The court of appeals singularly held that there had been no injury to competitors since the stations which did not receive the price reduction were left no worse off than

A. Meeting but Not Beating Competition

The Commission insists that a seller must demonstrate a knowledge of the competitor's price prior to the seller's own response. Thus, in *Forster Mfg. Co.*,[39] the Commission found that Forster, which had driven its major competitor out of business by lawful across-the-board but below-cost reductions in the price of wooden skewers, was not entitled to the meeting competition defense to charges of price discrimination in ice-cream spoons, since it lacked "knowledge" of the price offered for this commodity by its competitor.[40]

Another issue presented by the FTC's objective "beating" criterion arises in cases of precise duplication of prices offered by competitors whose products, in the Commission's opinion, have previously received inferior public acceptance.[41] Thus, in the most recent development in the famous

they had been previously—they were still unable to compete with the stations which were offering competing makes at reduced prices. This, of course, ignores the fact that as a result of the price discrimination they were less able to compete, for if the reduction had been uniform, they would have been able to match the lower prices then available from other dealers.

[39] TRADE REG. REP. ¶ 16243 (FTC Jan. 3, 1963), *rev'd*, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 33 U.S.L. WEEK 3284 (U.S. March 1, 1965).

[40] Chairman Dixon, speaking before the New York City Bar Association on January 30, 1964, explained *Forster* as requiring three determinations by a seller seeking to invoke § 2(b): "(1) that the buyer seeking the lower price has in fact received a competitive offer; (2) the identity of the competitor that made the competitive offer; and (3) the actual price at which the competitor allegedly offered to sell to this buyer." TRADE REG. REP. ¶ 50220, at 55272. The Chairman's apparent assumption of a "buyer seeking the lower price" is revealing since it ignores the possibility that a buyer, once having attained discriminatorily lower prices, will not solicit further sellers at this same price. The competing seller often will have to take "offensive" steps in his own defense by approaching the buyer. If Chairman Dixon's assumption is correct as to buyers "seeking" lower prices, then there is all the more reason to treat gently sellers who are responding at the request of purchasers to discriminations by their competitors.

[41] The evaluation of such "public acceptance" is most difficult, for it is often a subjective determination and is sometimes complicated by other antitrust considerations. Thus in the gasoline distribution industry the so-called independent brands are subject to effective price control by the large companies, whose vertical integration permits them to regulate the amount of independently refined crude oil available to the consuming market. So-called "price-cutting independent jobbers" thus are often dependent upon the major companies whose ability to deprive the independents of gasoline prevents them from price-cutting below a given figure. In turn major company power is balanced by fear of antitrust prosecutions. Rostow & Sachs, *Entry Into the Oil Refining Business: Vertical Integration Re-examined*, 61 YALE L.J. 856, 912 (1952). See CASSADY & JONES, THE NATURE OF COMPETITION IN GASOLINE DISTRIBUTION AT THE RETAIL LEVEL—A STUDY OF THE LOS ANGELES MARKET AREA 116-27 (1951). The results of the present comprehensive investigation of the petroleum industry by the Department of Justice, see TRADE REG. REP. No 178, at 2 (Dec. 14, 1964), will undoubtedly yield fresh information. Commission refusal to allow the meeting competition defense to large companies reacting to the competition of price-cutting jobbers would have the effect of weakening large-company control of gasoline pricing and hence would yield a result favorable to competition. It seems more reasonable, however, to rely on the Sherman Act in this area rather than a contorted interpretation of the Robinson-Patman Act. Moreover, the evaluation of an "inferior product" is rendered still more difficult in the gasoline area by the fact that the private brands are often of precisely the same origin as the more popular brands. It is doubtful whether the Robinson-Patman Act should be utilized in such a manner as to negative the values of trademarks and advertising through an interpretation which protects lesser-known "private brands" from price competition.

Sun Oil Co. case,[42] the FTC hearing examiner again rejected Sun's meeting competition defense, because the price discrimination involved was not undertaken in response to competitor Cities Service's price to the retailer of private-brand "Supertest." The examiner added that "meeting the price of an inferior product or one of substantially less public acceptance amounts to undercutting rather than meeting a competitor's price." [43]

Such a description suggests that the characterization of a price as "beating" competition really involves the evaluation of "good faith," rather than any wholly objective requirement of precisely equaling a competitor's price. Congress has spoken appropriately through a purpose clause; thus it is the seller's intent, rather than the effect of the price, with which the act is here concerned.[44] Only under this interpretation could the Supreme Court hold that "section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price." [45] Accordingly, the courts have consistently held that a mere incidental undercutting of price will not negate a section 2(b) meeting competition defense.[46] A price substantially lower than that to which it is supposedly responding may compellingly suggest that the price discrimination was not in fact a good-faith response to another seller's price.[47] If the defendant's motive is not thus refuted, the mere fact that his response was "overly competitive" is of itself insignificant.

If the issue, then, is "good faith," any inflexible requirement of specific price knowledge seems unreasonable. As the Commission admitted in

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[42] TRADE REG. REP. ¶ 16933 (FTC June 9, 1964).

[43] *Id.* at 21998.

For earlier instances of such Commission reliance on degree of public acceptance, see Standard Oil Co., 49 F.T.C. 923, 952 (1953), *rev'd*, 233 F.2d 649 (7th Cir. 1956), *aff'd*, 355 U.S. 396 (1958); Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 396-97 (1948), *rev'd on other grounds*, 191 F.2d 786 (7th Cir. 1951), *cert. denied*, 344 U.S. 206 (1952). For the same phenomenon in a judicial setting, see Gerber Prods. Co. v. Beech-Nut Life Savers, Inc., 160 F. Supp. 916, 921-22 (S.D.N.Y. 1958).

The Commission, inconsistently, refuses to allow a greater degree of public acceptance of a brand-name product to justify its sale to retailers at a higher price than that set for the sale of the same product under a private brand. If degree of public acceptance "is appropriate in considering the grade and quality of products for purposes of section 2(b), it is equally applicable to that determination under section 2(a)." Borden Co. v. FTC, 339 F.2d 133 (5th Cir. 1964).

[44] Of course only limited significance can be given to the plain meaning of an act characterized as "one of the most collossal failures of communications in the annals of United States legislative history." Timberg, Book Review, 57 NW. U.L. REV. 494 (1962). By contrast to such ambiguous statutes as the FTC Act, however, Robinson-Patman presents a clear standard of illegality and reasonably clear criteria of positive defenses.

[45] FTC v. A. E. Staley Mfg. Co., 324 U.S. 746, 759 (1945).

[46] Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356, 366 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956); Samuel H. Moss, Inc. v. FTC, 155 F.2d 1016 (2d Cir. 1946).

[47] Commissioner Elman, dissenting in *Forster*, suggested that in fact overall "bad faith" in the form of predatory price warfare by the respondent, rather than any guilt for the particular price discrimination charged, lay behind the Commission's decision in *Forster* and warned against "throwing the book at a respondent who has engaged in reprehensible conduct." TRADE REG. REP. ¶ 16243, at 21091 (FTC Jan. 3, 1963).

Continental Baking Co.,[48] "rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense . . . ." [49] However, the Commission still refuses to relieve sellers from the inflexible specific knowledge requirement. Thus three weeks after its pronouncment in *Continental Baking*, the Commission in *Exquisite Form Brassiere, Inc.*,[50] rejected a defense of meeting competitors' advertising credits to retailers, because of respondent's failure to adduce evidence that it "was in any manner aware of these particular advertisements," or "as a matter of practice and policy, regularly made itself aware of competitor's specific cooperative advertisements . . . ." [51] The respondent, in fact, had appended a chart purporting to show that all its advertising allowances were made solely in response to prior advertising allowances of its competitors.

The Commission's reliance on the "no evidence" finding emphasizes the unreasonableness of the knowledge requirement. The question properly before the FTC in *Exquisite Form* was whether the chart and other material were sufficient to establish good faith. The decision should not have been based purely on a lack of precise knowledge. In the business world such knowledge is often impossible to attain, and where it is available, it will often be unreliable. A buyer seeking promotional or price discounts has a strong motive to set too low a figure for offers made by competing sellers, or even to offer detailed accounts of nonexistent offers. Competing sellers have every reason to deny offering such possibly illegal prices or allowances. Respondents should be allowed to act reasonably on the basis of information available under the circumstances, and this reasonableness should be evaluated as an element of good faith.[52]

In fact, in industries more complicated than women's foundation garments, compliance with any specific knowledge requirement is an impossibility. How, for example, is a gasoline distributor to meet the "price" of an integrated supplier-retailer? Any "price" in this context necessarily would be an artificial construct.[53] Even where price lists are available to

[48] Continental Baking Co., TRADE REG. REP. ¶ 16720 (FTC Dec. 31, 1963).

[49] *Id.* at 21647.

[50] TRADE REG. REP. ¶ 16753 (FTC Jan. 20, 1964) (promotional allowance case); see Robinson-Patman Act § 2(d), 49 Stat. 1527 (1936), 15 U.S.C. § 13(d) (1958).

[51] Exquisite Form Brassiere, Inc., TRADE REG. REP. ¶ 16753, at 21689 (FTC Jan. 20, 1964).

[52] In reversing the Commission's decision in *Forster*, see note 39 *supra* and accompanying text, the First Circuit observed that the Commission's proper role is to evaluate the reasonableness of the knowledge acted upon in evaluating a meeting competition defense. Forster Mfg. Co. v. FTC, 335 F.2d 47 (1st Cir. 1964). Any other knowledge requirement is unrealistic, for "the seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and . . . neither expects the other, or can be expected, to lay all his cards face up on the table." *Id.* at 56.

[53] See *The Supreme Court, 1952 Term*, 77 HARV. L. REV. 81, 175 (1963). This is precisely the situation not covered by the Supreme Court's decision in FTC v. Sun Oil Co., 371 U.S. 505 (1963). See note 38 *supra*. Ironically, academic comment mistakenly construed the decision as sharply limiting the effectiveness of the meeting competition defense, paying too little heed to the Court's specific statement that it was not establishing a rule for the situation presented by retail gas-war competition from an integrated price-cutter or by a retailer-competitor who has received a specific price-cut from his supplier. See, *e.g.*, 15 BAYLOR L. REV. 93, 96 (1963). These two

the public, as they are in many industries, such information usually does not establish a specific price for an individual commodity under all conditions. In most cases different customers will pay differing complete prices for the same or closely similar goods after discounts or allowances are calculated.[54] Variations in pricing, so-called *ad hoc* pricing, are always possible and are not necessarily illegal. Furthermore, even if the component price is available to a potential respondent, the ultimate price—the one as to which precise knowledge is required—will still vary with the calculation of transportation and packing charges, deductions for delivery to the buyer's truck, or other services rendered by the buyer.

Moreover, reliance on the knowledge standard easily lends itself to abuse. There is a possibility that the formalistic acquisition of a "file" on competitors' prices by companies whose attorneys are conversant with present FTC practice may permit sellers who are acting in bad faith to exculpate themselves, while actual good-faith practitioners may be convicted because of their lack of complete knowledge. Finally, broader antitrust considerations militate against encouraging exchange of price information among competitors; the temptation to arrange prices and thus violate the Sherman Act is omnipresent even without official encouragement.[55] In situations with competitive-bidding attributes, competition would be sharply curtailed if the Commission prohibits pricing practices which in fact are competitive, but are necessarily made in ignorance of other sellers' sealed bids.

B. "Defensive" or "Offensive" Competition

Despite judicial objections and practical obstacles the Commission continues to restrict the meeting competition defense to differentials granted to "retain" rather than "acquire" customers. While this restriction has on occasion gained court approval,[56] more recent decisions have reversed the Commission's restrictive formulation.[57] The Commission has refused to seek Supreme Court review of the cases allowing "offensive" price discriminations justified by the use of the meeting competition "defense," and it has

exceptions present the only two cases where a distributor's price cut in a gasoline war would be truly "meeting competition." The Commission itself in Ponca Wholesale Mercantile Co., TRADE REG. REP. ¶ 16814 (FTC Feb. 24, 1964), recognized the defense as available where a wholesaler was meeting the price of a manufacturer selling directly to the retailer. Such a construction is unassailable and indicates that the Supreme Court's decision in *Sun Oil* does not of itself involve any diminution of competitive justification.

[54] SAWYER, BUSINESS ASPECTS OF PRICING UNDER THE ROBINSON-PATMAN ACT § 1.2, at 7 (1963).

[55] See Galgay, *Antitrust Considerations in the Exchange of Price Information Among Competitors*, 8 ANTITRUST BULL. 617 (1963).

[56] Standard Motor Prods., Inc. v. FTC, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959); *accord*, C. E. Niehoff & Co. v. FTC, 241 F.2d 37 (7th Cir. 1957), *cert. denied*, 355 U.S. 941 (1958).

[57] Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48 (7th Cir. 1962) (discriminatory prices for potato chips); *accord*, Delmar Constr. Co. v. Westinghouse Elec. Corp., 1961 Trade Cas. ¶ 69947 (S.D. Fla. 1961).

relied on the split of authority in the courts of appeals to justify unmodified continuation of its prior policy.[58] This reluctance is not surprising, for the Commission's interpretation is in no wise based on judicial or Congressional mandate; the legislative history provides no direction. On first introducing this limitation in *Anhauser-Busch, Inc.*,[59] the FTC relied primarily upon the Supreme Court's *Standard Oil Co. v. FTC* decision.[60] Since that case involved Standard's attempt to retain its jobbers in the face of repeated offers of lower prices from its competitors, it would have been difficult for the Court not to speak obiter dictum of customer retention.[61] But since the Court's basic holding was to reject the Commission's claim that section 2(b) did not in any way constitute a complete defense, the Commission's employment of the decision to emasculate the defense [62] is unjustifiable. To the contrary the language of *Standard Oil* should be limited to the facts of the case in order not to "promulgate a general doctrine surrounding each seller with a protected circle of customers." [63]

The Commission's construction is doubly unfortunate, for in addition to placing the Robinson-Patman Act unnecessarily in conflict with the overriding pro-competitive antitrust laws, it is practically unworkable in light of normal business operations. Accurate identification of a "customer" in the business world is virtually impossible; actually, every purchaser of a commodity is a potential customer of every seller of that commodity.[64] An absolute requirement of "retaining customers" is ill-equipped to categorize the "customer" who buys from the seller some but not all of his requirements of the goods in question, the "customer" who buys from the seller other goods but not the particular products for which the discount is offered, the "customer" who has bought in the past but has made no recent purchase, or the "customer" who has negotiated with a view toward buying but has not yet completed the contract. Evaluation of such gradations will ultimately involve an inquiry into the seller's intent and understanding in offering the price differential—a subjective factor. The only objective alternative would be an absolute interpretation of the standard to reject any claim of meeting competition unless a differential is made by a seller in response to a competitor's offer made itself in response to the seller's original offer to a purchaser who has previously bought from the seller all his requirements of a particular commodity. Such a competitively stagnating interpretation would surely be rejected by the courts of appeals

[58] *FTC Position on Meeting Competition Defense*, TRADE REG. REP. ¶ 50166 (Nov. 23, 1962).

[59] 54 F.T.C. 277 (1957), *rev'd*, 265 F.2d 677 (7th Cir. 1959), *rev'd*, 363 U.S. 536 (1960).

[60] 340 U.S. 231 (1951).

[61] Standard Oil Co. v. FTC, 340 U.S. 231, 240 (1951).

[62] *Id.* at 242.

[63] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 184 (1955).

[64] *Cf.* Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 970 (1951).

in view of their refusal to accept even the Commission's current interpretation. And any large-scale attempt to identify customers by advisory definition would be stymied by the undeveloped state of the Commission's advisory-regulation procedure.[65]

However, existing Commission dicta suggest that it is possible to construct a more flexible test. Even if a seller "must consider the size and strength of the competitor whose price he is meeting and tailor his counteroffer to the scope of that offer," [66] Commission interpretation of that response through an evaluation of the seller's pragmatic intent seems sufficient to prevent any misuse of a meeting competition defense. The Commission should find no fault with a price differential motivated by a desire to avoid losing a sale, where the seller's nonpredatory [67] business practices place him in a competitive, but not necessarily a purely defensive, situation in relation to other sellers who independently have offered to any buyer a price below the seller's standard rate. But where there is no legitimate competitive challenge, price differentials, whether "defensive" or "offensive," should not be permitted.

III. The Requirement of Meeting a "Lawful" Price

An elastic interpretation of the Commission's requirement that any price met should be a "lawful" one would facilitate a reconciliation of the prohibition on price discrimination with the permission of competition. The requirement itself is consonant with more pervasive antitrust considerations. If "unlawful" prices could be met, price discrimination would spiral; a pricing system of discriminations [68] could justify similar responses throughout the industry on an ever-widening basis—with the original discriminator alone being liable to an eventual cease-and-desist order. The Commission, however, has defined "lawfulness" in a manner which would prohibit even legitimate competitive response.

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[65] Only since July 1, 1962, has any formal procedure been available for soliciting the Commission's advice on the legal implications of possible business actions. These advisory opinions normally concern particular situations and are issued in response to industry requests for guidance. As of March 1964 only about eighty such requests had been acted upon, and, in about twenty percent of these cases, the Commission found it impracticable to respond. Address by G. S. Rountree, Chief of the FTC's Division of Advisory Opinion, Bureau of Industry Ordinance, before District of Columbia Bar Association, March 24, 1964, in Trade Reg. Rep. ¶ 50229.

[66] Forster Mfg. Co., Trade Reg. Rep. ¶ 16243, at 21087 (FTC Jan. 3, 1963).

[67] What constitutes a "predatory" position should be determined by reference to the other antitrust laws.

[68] Every combination or arrangement of prices can in one sense be termed a "pricing system." A classic example of a "discriminatory pricing system" is found in Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945), and FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945), which involved a basing-point arrangement of prices under which sellers of glucose, disregarding actual plant locations, set all prices f.o.b. Chicago. The issue is primarily one of fact. It is the existence of a pattern of differentiation unjustified by cost or other relevant pricing considerations which makes a pricing system discriminatory, not the mere absorption of freight charges or basing-point arrangement. 324 U.S. at 757.

A. Commission Intractability

In establishing its lawfulness requirement, the Commission has elevated judicial and legislative scraps into an absolute barrier which significantly reduces the effectiveness of the defense. The legislative history reveals a single statement, that of Representative Utterback,[69] explaining that only "legal" prices could be met under the proposed meeting competition proviso,[70] but the bill as passed did not contain a legality requirement. The prohibition on the meeting of illegal prices was explicitly formulated in the pricing-systems cases,[71] where the "meeting of competition" in response to well-developed patterns of discriminatory pricing by competitors was prohibited. The language of *Standard Oil*,[72] in which the Supreme Court made legal the meeting of an "equally low, lawful price," must be understood as written in the light of the previous pricing-systems cases. The use of the word "lawful" in *Standard Oil* was gratuitous, since legality of price was not there in question. However, the Commission proceeded to interpret the *Standard Oil* decision as blanket justification for a "lawfulness" requirement. As usual, the courts did not unanimously agree,[73] and the Commission has relied upon the split in the circuits to justify unmodified continuation of an interpretation unpopular with the judiciary.

Despite Congress' failure to consider the issue, the Commission has gone far beyond the *Standard Oil* dictum by requiring respondents to come forward with positive evidence that at the time of discrimination they had reason to believe that competitors' prices were lawful. In *Tri-Valley Packing Ass'n* [74] and in *American Oil Co.*,[75] the Commission rejected meeting competition defenses because respondent "did not adduce evidence to show that it had reason to believe that the prices of its competitors were lawful" and therefore had "not established on the record that it acted in good faith." [76] This subjective conceptualization of the lawfulness requirement suggests that it is but another element of the overriding "good faith" standard. It is therefore not surprising that, as with other aspects

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[69] 80 CONG. REC. 9418 (1936).

[70] Rowe suggests, however, that Representative Utterback's remarks were meant to apply only on the retail level, announcing congressional understanding that discriminations to match previous nonresponsive discriminatory prices to large buyers were illegal and not to indicate any general requirement of "legality." ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 215 (1962). Representative Utterback appears, however, to have been speaking in a general context.

[71] Corn Prods. Ref. Co., 144 F.2d 211, 217 (7th Cir. 1944), *aff'd*, 324 U.S. 726, 753-54 (1945).

[72] Standard Oil Co. v. FTC, 340 U.S. 231, 250 (1951).

[73] See, *e.g.*, Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356, 366 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).

[74] 60 F.T.C. 1134, *rev'd on other grounds*, 329 F.2d 694 (9th Cir. 1964).

[75] 60 F.T.C. 1786 (1962), *rev'd on other grounds*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964).

[76] Tri-Valley Packing Ass'n, 60 F.T.C. 1134, 1181 (1962) (Finding of Fact No. 9).

of "good faith," the Commission's lawfulness requirement has been encumbered with inflexible objective criteria.

B. "Lawfulness" as an Element of "Good Faith"

To require production of evidence of reasons for believing the competitor's price to be lawful presupposes an unrealistic competitive environment. Whether a price is "lawful" or not is a legal, not a business concept, and, as this Note illustrates, it is complex and difficult for the Commission and courts to evaluate. For example, in the *Tri-Valley* case itself,[77] more than five years and many legal steps passed before the court of appeals determined that the information available was still deficient and remanded the case to the Commission for additional factual findings.[78] In contrast the Commission expects the businessman to make an immediate decision on legality at his own peril and without the Commission's fact-finding tools.

Businessmen do not make such complex judgments in the exigency of the market place. Normally there is no evidence to indicate whether or not the competitor's price is "lawful." The businessman cannot assume that his competitor's cost structure is the same as his, and antitrust considerations prevent or should prevent full access to his competitor's pricing bases.[79] Cost-justification is not infrequently fought to the Supreme Court,[80] and the competitor may have been faced with a meeting competition situation in response to a third seller's offer. The respondent's inability to show positive grounds for a reasonable belief that the competitor's price was lawful is not inconsistent with the absence of reasons for believing the price unlawful.

Nor will counsel be able reasonably to evaluate the "lawfulness" of the competitor's price, for he will rely only on the generally inconclusive information available to his client. Given the pattern of Commission hostility, conservative counsel will certainly never advise businessmen to rely confidently upon the meeting competition defense. However, a candid attorney may advise his client of the inconsequential punitive results of meeting an unlawful price.[81] If, as a result of counsel's advise, the competitor's price is not met or if business motivation leads the client to respond with a discriminatory price, competition has been restricted or the law has been violated without any actual determination of whether the price being met is illegal. In either event counsel's advice has not contributed to a result more lawful than the unadvised businessman alone would have reached. Moreover, the Commission's interposition of absolute evidentiary criteria

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[77] No. 7225, FTC, Aug. 6, 1958.

[78] Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694 (9th Cir. 1964).

[79] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 182 (1955).

[80] See Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1, 21-23 (1956); Note, 66 YALE L.J. 935-36 (1957); note 21 *supra*.

[81] See text accompanying notes 30-36 *supra*.

may lead to abuse by bad-faith businessmen—just as it does in the "specific knowledge" context.[82] Where the businessman does what he would have done anyway, but counsel skillfully directs the appearance of his action, good faith is not necessarily present.

The apparent lawfulness of a competitor's price is basic to a flexible evaluation of good faith. Where a competitor's price is unquestionably illegal, as with pricing systems, the Commission should have no difficulty in presenting evidence to establish the obvious illegality of the price when met and hence the apparent absence of good faith. To the extent that a competitor's price could not appear clearly legal or illegal to the seller at the time it was met, "legality" should be irrelevant to an evaluation of good faith. Where a pricing system is matched by a responsive system, an inference of the absence of good faith is justified. But where a competitor utilizes a pricing system, a respondent should be free to discriminate as to a particular price if by a preponderance of factors his differentiation is found to be legitimately in reaction to and limited to the competitor's impact on his own sales—that is if he has not established his own "pricing system" in response.[83]

The balanced evaluation here suggested is not alien to Commission thinking: it is precisely the type of evaluation which the Commission itself urged on the Supreme Court in *Standard Oil*, where it requested the right to evaluate the meeting competition defense only as one factor in determining whether the price differentiation had been competitively harmful and thus in violation of section 2(a).[84] Prior to 1962 Commission counsel often freely undertook the burden of demonstrating that respondents could not possibly have believed competitors' prices to be lawful. Thus in *Callaway Mills Co.*,[85] Commission counsel argued that respondent knew or should have known that prices being met were unlawful. In *Continental Baking Co.*,[86] a section 2(b) defense was upheld by the Commission in a landmark decision without any objection to the insistence by respondent's counsel that the Commission had the burden of proof of "showing that the buyer had reason to believe that the price he was receiving was unlawful." Moreover, in the analogous case of buyer's solicitation of a price discrimination, the Supreme Court has held that proof of a violation requires a

[82] See p. 725 *supra*.

[83] Where confronted with an overall pricing "system," the Robinson-Patman Act and the other antitrust laws allow a system-wide response. Moreover, across-the-board price reductions become more feasible when the scope of the competitor's pricing system is greater. The meeting competition defense is concerned with individual situations where the respondent by economic choice or necessity does not make an across-the-board response. But once overall pricing structures are involved, across-the-board responses, or, if possible, cost-justified reductions to large purchasers, are not an unreasonable requirement.

[84] Standard Oil Co. v. FTC, 340 U.S. 231, 251 (1951).

[85] TRADE REG. REP. ¶ 15412 (FTC Sept. 29, 1961) (hearing examiner upheld § 2(b) defense for carpet maker), *rev'd*, TRADE REG. REP. ¶ 16800 (FTC Feb. 10, 1964).

[86] TRADE REG. REP. ¶ 16720 (FTC Dec. 31, 1963).

showing by the Commission of the buyer's *knowing* receipt of an *illegal* price concession. The Commission was required to demonstrate that the buyer must have known or necessarily suspected that price differentiation in his favor was violative of the law—that is, that competition was substantially reduced.[87]

C. The Need To Retain the Lawfulness Requirement

The Commission's general reluctance to interpret the Robinson-Patman Act to facilitate competitive response has resulted in a demand for abolition of the lawfulness requirement and even in suggestions of a policy permitting only unlawful prices to be met.[88] However, if the requirement were completely eliminated, it would have the undesirable result of encouraging a spiraling of discriminatory prices throughout an industry. Moreover, the Commission would be deprived of an important subject of inquiry in establishing the respondent's good faith—the basic thrust of the meeting competition defense.

The attractiveness of an "unlawfulness" requirement arises from an analogy between the meeting competition defense and a criminal attack.[89] Unlawful prices are the unlawful attack; lawful prices, a lawful attack. Hence self-defense permits only unlawful prices to be met, just as only unlawful assaults can be met in the criminal law.[90] However, an unlawfulness requirement also fails to recognize business realities. The "characteristic" of the price is not imputable to its competitive effect. A lawful price reduction steals a customer as effectively as an illegal one. To a businessman the object of concern is not the legal characterization of another seller's price, but the impact that price will have on the first seller's market. The criminal law does not expect a man in physical danger to reach a personal verdict as to the possible exculpation of his assailant by intricate legal factors of incapacity. The law requires reasonable

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[87] Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953). The difficulty in establishing a § 2(f) violation arises from the evidentiary burden of showing that the buyer had knowledge that the situation was exceptional and that the buyer actively requested the discrimination. The meeting competition defense assumes that respondent had some knowledge of the situation to which he is claiming a "response." In this context the Commission should only be concerned with the alleged illegality of the price being met where that "illegality" was clearly apparent to the respondent. Conviction in appropriate cases will not be prevented, for the Commission should have other factors from which to find an absence of good faith.

[88] An "unlawfulness" requirement has been urged by various commentators. *E.g.*, AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 99 (2d rev. ed. 1959); Continental Baking Co., TRADE REG. REP. ¶ 16720, at 21649 (FTC Dec. 31, 1963) (MacIntyre, Comm'r, dissenting); Note, 43 MINN. L. REV. 327, 338-39 (1958). The "lawfulness" requirement has been criticized by a minority in ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 185 (1955) and by other writers. See ZORN & FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS 133-34 (1937); Note, 36 COLUM. L. REV. 1285, 1312 & n.146 (1936); Note, 48 VA. L. REV. 1294, 1303 (1962).

[89] See, *e.g.*, PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 98 (1963).

[90] See Continental Baking Co., TRADE REG. REP. ¶ 16720, at 21649-50 (FTC Dec. 31, 1963) (MacIntyre, Comm'r, dissenting).

response in the criminal attack situation: sufficient force to repel, obligation to retreat where retreat is reasonable.[91]

Moreover, semantic differentiations of "lawfulness-unlawfulness" are merely formalistic, since the effect of either is decisively determined by the Commission's assignment of the evidentiary burden. A shift in terminology from "lawfulness" to "unlawfulness" would simply preserve in altered form the present anticompetitive interpretation, not remedy it. Under an unlawfulness interpretation sellers presumably would have to supply reasons for their belief that the prices met were unlawful. Their market response, however, would still be on a business basis: if loss of a customer were at stake, the inefficacy of Commission deterrents would indicate a decision to meet the competitor's price.

Since neither definition differs in its capacity to affect the "spiral" of price discrimination, the FTC should expect a reasonable response, here delineated by the concept of "good faith" and motivated by the desire to compete. The nature of the opponent's attack should be of interest only to the extent that it illuminates the nature of the respondent's reaction.

IV. Toward Competitive Nondiscrimination Under Present Law

A. Trends in Enforcement of the Robinson-Patman Act

1. Commission Acceptance of the Meeting Competition Defense

Recent months have witnessed a number of startling developments in Commission policy toward enforcement of the Robinson-Patman Act. The FTC has now accepted meeting competition defenses in situations basically similar to those in which for some twenty-five years it had always rejected the defense. For example, in the original *Standard Oil* case,[92] even after remand, the Commission had refused to allow the meeting competition defense. On the facts of the case, the court of appeals disregarded alleged FTC expertise and reversed the Commission, and the Supreme Court affirmed this factual interpretation.[93] Suddenly, in *Continental Baking*, the Commission made a factual finding that the respondent had granted discriminatory discounts only where equal or larger discounts had been given by its competitors and only where they were necessary "to continue selling to the customer in question."[94] The Commission observed that the discounts had been given only after long forbearance and that the company had taken care to verify its customers' claimed discounts through its own "on-the-spot sales representatives." The factual situation in *Continental Baking* is so compelling that it almost might serve as a guide

[91] See, *e.g.*, Brown v. United States, 256 U.S. 335 (1921); State v. Thomas, 184 N.C. 757, 114 S.E. 834 (1922).

[92] Standard Oil Co. v. FTC, 340 U.S. 231 (1951); see notes 10, 11, 72, 84 *supra* and accompanying text.

[93] FTC v. Standard Oil Co., 233 F.2d 649 (1956), *aff'd*, 355 U.S. 396 (1958).

[94] Trade Reg. Rep. ¶ 16720, at 21647-48 (FTC Dec. 31, 1963).

to business counsel in illustrating the conditions under which discounts might be given in safe reliance upon the meeting competition defense. Given the Commission's fixed adherence to objective criteria, it may become a model for formalistically satisfactory, but in fact not truly competitive, price discriminations overseen by counsel.[95]

While the Commission needed twenty-five years to accept its first meeting competition defense voluntarily in *Continental Baking*, the second followed within two months. In *Ponca Wholesale Mercantile Co.*,[96] a cigarette wholesaler had offered a six to seven cent price discount exclusively to a few large retailers to prevent these retailers from purchasing directly from a manufacturer engaged in dual distribution. The facts were thus suitable for the possible creation of another Commission rigidity—a requirement of same-level competition with the seller whose price had been met. The FTC had strong incentive to fashion such a standard, for in *Sun Oil* the Supreme Court had affirmed the Commission's contention that price discrimination is justifiable under the meeting competition defense only where the price being met is that of the seller's own competitor.[97]

Complaint counsel argued that the wholesaler was not truly in competition with the manufacturer because of the New Mexico requirement that state tax stamps on the cigarette packages be affixed within the state boundaries, a requirement with which the out-of-state manufacturer could not comply. The Commission could have ruled that the section 2(b) defense is available only against "full competitors"—those who in every essential, not only in price, are engaged in competition at the same level as respondent. However, the Commission rejected the hearing examiner's conclusion that the meeting competition defense was unavailable because the wholesaler was not in competition with the manufacturer. The Commission refused "a strained and hypertechnical definition of competition not consonant with the realities of the market place," [98] and preferred to stress the realities of competition. The retailers would certainly have bought from the manufacturer and affixed the stamps themselves, rather than lose the lower rates which otherwise would have been available only from the manufacturer.

Finally, *Beatrice Foods Co.*[99] indicates that the new attitude has reached even to the field stage. In that case a hearing examiner sustained

[95] Respondent's good-faith reliance upon counsel may even, in exceptional cases, prevent a cease-and-desist order from issuing. Thus the hearing examiner considered it "unnecessary" to issue an order against Furr's, Inc., where respondent, charged with violating § 5 of the FTC Act through soliciting discriminatory promotional allowances, made "an affirmative good-faith effort not to violate the law." Counsel's advice, which eventually proved unsound, nullified the effort. Furr's, Inc., TRADE REG. REP. ¶ 17141 (FTC Nov. 27, 1964).

[96] Ponca Wholesale Mercantile Co., TRADE REG. REP. ¶ 16814 (FTC Feb. 24, 1964).

[97] FTC v. Sun Oil Co., 371 U.S. 505 (1963).

[98] Ponca Wholesale Mercantile Co., TRADE REG. REP. ¶ 16814, at 21790 (FTC Feb. 24, 1964).

[99] TRADE REG. REP. ¶ 17071 (FTC Sept. 15, 1964).

a meeting competition defense to charges of illegally discriminatory prices and allowances to favored purchasers of dairy products. The examiner found a factual situation similar to that in *Continental Baking*—specific replies to known offers by competitors, verified by respondent's local sales representatives.

2. Continuation of the Absolute Criteria

Despite its recognition of the subjective nature of the good faith standard, the Commission has not renounced any of its absolute criteria. In fact in *Continental Baking*, notwithstanding Commissoner MacIntyre's insistence that the lawfulness requirement certainly would be struck down by the Supreme Court and that an unlawfulness requirement should prevail, the Commission did not take the opportunity to relieve respondents of the requirement of showing grounds from which a reasonable man might have inferred that the price being met was lawful.[100] Moreover, just two weeks before its decision in *Ponca,* the Commission added yet another inflexible element to its concept of good-faith meeting of competition. In *Callaway Mills Co.*,[101] it held that a seller utilizing the defense must establish that his competitor's price was for merchandise comparable in quality of materials and construction to the merchandise offered by the seller.[102]

Also early in 1964 the Commission in *Exquisite Form Brassiere, Inc.*,[103] rejected on factual grounds, respondent's claim of good-faith meeting of competition in the granting of discriminatory promotional allowances. The Commission rejected the defense basically through reliance upon its "knowledge" requirement,[104] although the respondent attempted to bring itself within the *Continental Baking* factual situation by showing graphically that allowances had been granted only in response to competitor's initial allowances to customers.[105]

3. Enforcement Through the Federal Trade Commission Act

To compound this inconsistency in approach, the Commission, in *Max Factor*,[106] announced a policy of proceeding in the future through section 5 of the Federal Trade Commission Act in buyer-induced promotional discrimination cases. The Commission refused to accept the meeting

[100] TRADE REG. REP. ¶ 16720 (FTC Dec. 31, 1963).

[101] *Sub nom.* Bigelow-Sanford Carpet Co., TRADE REG. REP. ¶ 16800 (FTC Feb. 10, 1964).

[102] However, the Commission's insistence that the defense has consistently been denied to sellers of goods normally priced at a premium, *id.* at 21755, does not establish a precedent for requiring a respondent to establish the comparable quality of the competitor's goods. The hearing examiner originally had accepted the meeting competition defense and had therefore dismissed the charges. Callaway Mills Co., TRADE REG. REP. ¶ 15412 (FTC Sept. 29, 1961).

[103] TRADE REG. REP. ¶ 16753 (FTC Jan. 20, 1964).

[104] See notes 39-51 *supra* and accompanying text.

[105] *Ibid.* Compare notes 94-95 *supra* and accompanying text.

[106] Max Factor & Co., TRADE REG. REP. ¶ 16992 (FTC July 22, 1964).

competition defense which two suppliers interposed against charges of granting special "promotional" allowances to a buyer who had solicited them. The court of appeals reversed,[107] and, on remand, the hearing examiner sustained the defense and dismissed the charges against one of the respondents.[108] The Commission, however, speaking through Commissioner Elman, who had written the *Continental Baking* opinion, avoided ruling on the meeting competition defense. It entirely dismissed the charges on the grounds that section 5, with its broad prohibition of "unfair methods of competition," is better calculated to deal with the problem of "special" promotional allowances—which, in the Commission's opinion, is basically one of buyer-induced discrimination.[109]

The significance of this pronouncement lies in the fact that the entire Robinson-Patman Act is fundamentally directed at buyer-induced discrimination.[110] Promotional discriminations are in no way distinct from price discriminations; both are primarily buyer-caused.[111] The similarity between the two is illustrated by the ease with which the courts extended the meeting competition defense to cover promotional, as well as price, discrimination[112] and by the Commission's immediate acceptance of this extension,[113] despite its continued refusal to recognize other judicial refinements, such as permission of "offensive" meeting of competition.[114] In the same situations in which section 5 would prohibit promotional discrimination, it would equally prohibit price discrimination. For example, the protracted *Tri-Valley Packing*[115] case involved not only the question of the legality of the competitor's price under the meeting competition defense to the section 2(a) charge of price discrimination.[116] The Commission in fact brought, although it apparently did not press, charges under section 5 of the Federal Trade Commission Act.[117] Thus, in the price discrimination context, the same behavior which evoked Robinson-Patman Act proceedings carried with it a section 5 charge almost as an automatic concomitant.

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[107] *Sub nom.* Shulton, Inc. v. FTC, 305 F.2d 36 (7th Cir. 1962).

The Commission subsequently accepted the defense as applicable to § 2(d) of the Robinson-Patman Act. J. A. Folger Co., TRADE REG. REP. ¶ 16078 (FTC Sept. 18, 1962).

[108] BNA ANTITRUST & TRADE REG. REP. No. 134, at A-9 (Feb. 4, 1964).

[109] TRADE REG. REP. ¶ 16992 (FTC July 22, 1964).

[110] See notes 5-6 *supra* and accompanying text.

[111] Compare notes 26-27 *supra* and accompanying text.

[112] See Shulton, Inc. v. FTC, 305 F.2d 36 (7th Cir. 1962); Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

[113] See J. A. Folger Co., TRADE REG. REP. ¶ 16078 (FTC Sept. 18, 1962).

[114] See Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48 (7th Cir. 1962); Delmar Constr. Co. v. Westinghouse Elec. Corp., 1961 Trade Cas. ¶ 69947 (S.D. Fla. 1961).

[115] 60 F.T.C. 1134 (1962), *rev'd on other grounds*, 329 F.2d 694 (9th Cir. 1964).

[116] See notes 74-78 *supra* and accompanying text.

[117] Complaint 7225, issued August 6, 1958, charged discrimination under § 2 of the Clayton Act. Complaint 7496, issued May 15, 1959, charged discrimination (unlawfully favoring one retail merchandise chain over competing customers) under § 5 of the FTC Act.

A similar abandonment of Robinson-Patman enforcement is evident in the area of buyers' liabilities. Although section 2(f) of the Robinson-Patman Act[118] in terms renders illegal only buyer's knowing receipt or inducement of a discrimination in price, considerable authority interprets it as applicable to buyer's inducement or receipt of promotional allowances on the ground that such allowances constitute a variant form of indirect price discrimination.[119] However, the Commission has chosen to employ section 5 of the FTC Act against this discriminatory practice. Although not all courts agree that section 2(f) covers promotional discriminations, the Commission's refusal in other areas readily to accept judicial interpretation of Robinson-Patman Act provisions suggests that its decision to forego Robinson-Patman enforcement in this area must be construed as a voluntary preference for enforcement through section 5.

Moreover, the FTC has recently provided substantial evidence of qualifying its enforcement of the Robinson-Patman Act by a "public interest" concept similar to that specifically found in section 5 of the FTC Act.[120] Thus, in a striking departure from past practice, it has refused to issue cease-and-desist orders in several cases, even after finding violations of section 2(a).[121] Some historical basis for this shift in enforcement policy may be found in *Moog Industries, Inc. v. FTC*,[122] where the Supreme Court set aside a court of appeals decision postponing the effectiveness of a cease-and-desist order under section 2(a) until competing firms were similarly restrained. The Court held that determination of the advisability of such a postponement was peculiarly within the competence of the Commission. Alluding to *Moog*, the Commission, in *Atlantic Prods. Corp.*,[123] postponed the effectiveness of an order against discriminatory advertising allowances until it could prepare a trade regulation ruling. In *Chesebrough-Pond's, Inc.*,[124] the same factual situation—discriminatory promotional payments by various drug producers—evoked

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118 49 Stat. 1527 (1936), 15 U.S.C. § 13(f) (1958).

119 Strong judicial authority sustains recovery of treble damages in private actions brought against buyers receiving discriminatory promotional allowances. Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916, 922-23 (5th Cir. 1962) (buyer's inducement and receipt of discriminatory allowances proscribed by § 2(d) treated as violations of § 2(f)); American Co-op. Serum Ass'n v. Anchor Serum Co., 153 F.2d 907, 913 (7th Cir.), *cert. denied*, 329 U.S. 721 (1946); Castlegate, Inc. v. National Tea Co., 1963 Trade Cas. ¶ 70952 (D. Colo. 1963); Krug v. IT&T Corp., 142 F. Supp. 230, 237-38 (D.N.J. 1956). In the landmark case of Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962), approving the FTC's attack on promotional allowances under § 5, the court of appeals specifically avoided deciding whether § 2(f) applied to promotional discriminations. The Supreme Court withheld the same question in Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 73 n.14 (1953). The Commission itself in the early days of the act treated § 2(f) as applicable to promotional discrimination. See ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 432 (1962).

120 See *Withholding Cease-and-Desist Orders in Robinson-Patman Act Cases*, BNA ANTITRUST & TRADE REG. REP. No. 173, at B-1 (Nov. 3, 1964).

121 *Ibid.*

122 355 U.S. 411 (1958).

123 TRADE REG. REP. ¶ 16676 (FTC Dec. 13, 1963).

124 TRADE REG. REP. ¶ 17007 (FTC July 27, 1964).

proceedings under both the Robinson-Patman and Federal Trade Commission Acts. The Commission proceeded under the FTC Act against the drug companies allegedly inducing the discriminatory promotional payments and under Robinson-Patman against the drug producers.[125] However, the Commission postponed the effectiveness of the order entered against the producers pending "declaratory findings" to be made in the FTC Act proceedings.[126] And in *Sperry Rand Corp.*,[127] the Commission based its refusal to issue a cease-and-desist order on the unlikelihood of recurrence of the unlawful conduct involved.

Against this background the FTC's observations in *Ponca* gain added significance. There the Commission, although basing its decision on acceptance of the meeting competition defense, nonetheless indicated that there was in fact little need for a cease-and-desist order since invocation of New Mexico's Fair Trade Law had already ended Ponca's price reductions to large retailers.[128] Thus, even if the meeting competition defense had not been sustained, the Commission might have avoided issuing a cease-and-desist order on the ground specified in *Sperry Rand*—a ground conceptually allied to section 5 of the Federal Trade Commission Act.

Despite the difficulties the Commission has experienced in applying its rigid standards in proceedings under the Robinson-Patman Act, the Commission would be ill-advised to embark on enforcement through a section 5 standard, either by importing section 5 values into the Robinson-Patman Act or through utilizing section 5 itself as a separate vehicle for encouraging competition. The greatest danger here does not arise from the gross generality of the FTC Act's broad prohibition on "unfair methods of competition . . . and unfair or deceptive acts or practices in commerce." [129] Although section 5 is "probably the broadest statute in the land," [130] it seems likely that, as applied to situations otherwise falling under the Robinson-Patman Act, the courts will insist upon delimiting its generalities with the substance of the Robinson-Patman Act's standards of proofs and defenses.

The Commission itself, in *J. Weingarten, Inc.*,[131] has ruled that in a promotional discrimination case brought under section 5 of the FTC Act,

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[125] *Id.* at 22098; McKesson & Robbins, Inc., TRADE REG. REP. ¶ 15943 (FTC June 19, 1964); Druggists' Serv. Council, Inc., TRADE REG. REP. ¶ 15944 (FTC June 19, 1964). The docket listings in the CCH service, indicating the bringing of complaints 8510 and 8511 (in the latter two cases) exclusively under Robinson-Patman, are apparently incorrect.

[126] Chesebrough-Pond's, Inc., TRADE REG. REP. ¶ 17007, at 22098 (FTC July 27, 1964).

[127] TRADE REG. REP. ¶ 16791 (FTC Feb. 17, 1964).

[128] Ponca Wholesale Mercantile Co., TRADE REG. REP. ¶ 16814 (FTC Feb. 24, 1964).

[129] 52 Stat. 111 (1938), 15 U.S.C. § 45(a)(1) (1958).

[130] Address by FTC Chairman Dixon, American Association of Advertising Agencies, April 28, 1962, in 9 ANTITRUST BULL. 1 n.2 (1964); see Rahl, *Does Section 5 of the Federal Trade Commission Act Extend the Clayton Act?*, 5 ANTITRUST BULL. 533, 538 (1960) ("may be the widest delegation of law-making power ever made by Congress").

[131] TRADE REG. REP. ¶ 16349 (FTC March 25, 1963).

the buyer-recipient has the right to present possible justifications for the discriminations, such as lack of knowledge,[132] just as in a Robinson-Patman case he would have available the meeting competition defense. And the Supreme Court, in affirming a section 5 order against a geographic pricing system, held that the meeting competition defense is implicit in section 5 when used in the discrimination context.[133] Although the Second Circuit has confirmed the Commission's right to employ section 5 against pricing practices contrary to the "spirit," although not the letter, of the Robinson-Patman Act,[134] it is not at all likely that the courts would approve the blanket use of section 5 as a replacement for proceeding under the Robinson-Patman Act. It is more likely that the ambiguous standard of the FTC Act will be imported into the Robinson-Patman Act, not that the Robinson-Patman Act will be superceded by section 5 or employed to give rigid form to the FTC Act's provision. The Commission's recent actions in postponing section 2 cease-and-desist orders seem to confirm this likelihood.

However, the Commission may well be confusing flexibility in utilizing the meeting competition defense with freedom not to enforce the Robinson-Patman Act. Herein lies the great danger that true reform will be stifled by apparent flexibility unrelated to a solution of competitive problems. The Commission may thus ignore the basic problem under Robinson-Patman—the reconciliation of price competition with the prohibition of price discrimination. Trade regulation rules, *post hoc* evaluations of guilt, and flexibility in postponement or abrogation of cease-and-desist orders do not in any way arrest the spiraling of price discriminations. To the extent that ambiguous standards will permit erosion of the right to meet competition (as under a trade regulation rule ostensibly establishing conditions of promotional allowances, but thus actually imposing a prima facie implication of illegality on any deviation therefrom), they are inconsistent with the aims of the present antitrust laws. Where the use of section 5 would promise long periods of litigation and development of possibly fruitless standards, it should not be employed; but where it would allow more direct attack on buyer-induced discrimination, it would be welcome. All of these areas, however, can be improved by administration of the Robinson-Patman Act itself. If the Commission can supplement improved procedures by applying to the meeting competition defense its newly-found "flexibility," reconciliation of price competition with price nondiscrimination will be near achievement.

B. Optional Reporting: The Answer to the Spiral Effect

A conceptual approach allowing full utilization of the meeting competition defense will not alone render the Robinson-Patman Act workable.

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[132] *Id.* at 21182-83.

[133] FTC v. National Lead Co., 352 U.S. 419, 426-27, 431 (1957).

[134] American News Co. v. FTC, 300 F.2d 104 (2d Cir. 1962); Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962); see Giant Foods, Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962).

So long as the Commission enters the scene subsequent to the spiraling of discriminatory prices, recognition of the seller's right to meet competition does nothing to break the cycle of differentiations in favor of large buyers. If the deterrent power of publicity or the limited inhibitory effect of Commission cease-and-desist orders [135] is to prevent spiraling of discriminations, Commission action as near as possible to the time of the original discrimination is essential. In view of the Commission's extremely limited resources [136] for handling a regulatory problem of exceptional magnitude and its unsatisfactory record in utilizing such resources as it has had,[137] effective enforcement policy is significantly dependent upon industry self-policing. Given this situation, a flexible interpretation of "good faith" in the meeting competition defense can be of great value in obtaining for the Commission the necessary information.

If the Commission could depend upon individual businesses for information on discriminations purportedly made to meet competition, approximately at the time when the discriminations were being made, the Commission would be able immediately to initiate action to prevent the price discrimination from spiraling. Although the Commission lacks the power to issue cease-and-desist orders without investigations and hearings,[138] the very fact of the Commission's knowledge is likely to have substantial inhibitory effect on further discriminations. In any event the Commission's usual *post hoc* responsiveness will be considerably quicker, and opportunities for accumulating evidence and ascertaining factual situations will be correspondingly increased. Moreover, the receipt or non-receipt of such a report would be one factor among others in ascertaining the presence of good faith. As long as businessmen are assured that the Commission is actually undertaking to evaluate good faith in accord with the total situation and will not rule against the purveyor of a discriminatory price automatically upon learning of the discrimination, the businessman who is honestly responding to a competitive situation will have little reason not to inform the Commission of his price reduction. Thus informed, the FTC will be in a position to carry out the essential Robinson-Patman policy of limiting the cycle of discriminatory pricing by removing any unlawful price-cutting catalyst as quickly as possible. The businessman in turn will be free to pursue his own course without fear of artificial agency interpretation of his action. But if he hopes to avoid the Commission's

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135 See notes 30-36 *supra* and accompanying text.

136 For example, in FTC v. Cement Institute, 333 U.S. 683 (1948), a case of extraordinary importance, the Commission was able to pit three attorneys and a single economist against a defense staff encompassing forty-one law firms and an expenditure by respondents in excess of five million dollars. Blair, *Planning for Competition*, 64 COLUM. L. REV. 524, 525 (1964). The total funds available to the Commission for the fiscal year 1963 amounted to $11,471,973. 1962-1963 FTC ANN. REP. 31.

137 See notes 28-30 *supra* and accompanying text.

138 See FTC Act § 5, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(b) (1958). Broadly written orders to some extent allow avoidance of this restriction through permitting control of future conduct. See Comment, 29 U. CHI. L. REV. 706 (1962).

knowledge while illegally discriminating in price, his actions would be clearly stamped with an inference of bad faith. Moreover, business ethics would not impede the effectiveness of the reporting system, because a competitor would be in no way reporting on anyone other than himself. By definition a businessman would not intend to report the illegal action of a competitor when revealing his own response; moreover, he is not usually able to determine the legality or illegality of the competitive price he is meeting.

A flexible interpretation of good faith demands that failure to file such a report at the time of making the discrimination should not ipso facto constitute either a violation of Commission rules or a rebuttal of good faith meeting of competition. The Commission might well draw a different inference from the failure to report by a large corporation, with alert legal counsel and long experience in dealing with the FTC, than from the failure of a small firm to supply equivalent information. Adoption of such a flexible reporting requirement is clearly within the Commission's present power.[139]

A flexible reporting requirement coupled with a flexible evaluation of good faith will facilitate competition while inhibiting price discrimination, effectively implementing both general antitrust policy and the price discrimination rules of the Robinson-Patman Act.

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[139] The Commission's powers include the right to order regular and special reports, FTC Act. § 6, 38 Stat. 721 (1914), 15 U.S.C. § 46(b) (1958), to demand access to the records of any corporation, and to issue subpoenae requiring the production of documents at investigatory hearings, FTC Act § 9, 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958). See Pollock, *Pre-Complaint Investigations by the Federal Trade Commission*, 9 ANTITRUST BULL. 1 (1964). These powers have been characterized as probably the broadest and deepest possessed by any Government agency. Babcock, *Legal Investigation*, in ABA, AN ANTITRUST HANDBOOK 385, 386 (1958). Legislative history makes it clear that the power to order special reports is available in furtherance of any Commission activity.

> The reports which are required are of course thought to be necessary to carry out the purposes of the act—that is to say, to give the commission information which may be needed to make the act effective—but the commission may, under subdivision b, require any corporation at any time to furnish it any information that it sees fit to ask for, the extent of its request being limited only by its own discretion.

51 CONG. REC. 1182 (1914) (remarks of Senator Thomas). United States v. Morton Salt Co., 338 U.S. 632 (1950), for example, permitted the Commission to require special reports as to the manner in which a corporation was complying with a decree enforcing a cease-and-desist order entered under § 5 of the FTC Act.